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ABORIGINAL & RESOURCE BASED ECONOMIC DEVELOPMENT:

AN OVERVIEW OF RECENT TRENDS AND

THEIR IMPLICATIONS FOR THE BUSINESS LAWYER*

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1. Introduction

> *Peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically. Starvation breeds discontent.*
>
> *Justice Binnie in R. v. Marshall*[1]

In recent years, economic development initiatives by and for First Nations have taken many forms and have played out in many forums. Both on and off reserve, some First Nations have been striving to promote and encourage the development of business and industry in a manner that supports the goal of economic self-sufficiency, while at the same time recognizing the principles of sustainable development.

The Supreme Court of Canada's recent decision in *R.* v. *Marshall* has once again brought into sharp focus the balance that exists between the rights and interests of Aboriginal persons and those of non-Aboriginal persons to commercially develop natural resources. Business and industry should pay close attention to this and earlier Supreme Court pronouncements that consider aboriginal commercial use and development of resources that are, or may be, finite.

Manitoba's constitutional framework and the case law which breathes life into it suggest that a scenario similar to that played out in the East Coast fishery is unlikely, at least in the immediate future, to occur along the shores of our prairie lakes. Nevertheless, the scope and significance of the *Marshall* decision is such that anyone taking the role of legal advisor to business should give pause to consider its ramifications.

Due diligence on the part of business lawyers may now dictate that some consideration and forethought be given to the content of aboriginal and treaty rights in this province. Consultation with First Nations, while statutorily mandated in certain sectors and provinces, should become a critical centrepiece to any business development initiatives that may affect the rights or interests of Aboriginal communities. Ensuring that the rules of procedural fairness are adhered to by administrative bodies may present new challenges to the business lawyer, as the courts increasingly draw on administrative law principles to protect the interests of First Nations communities.

It is critical that the lawyer be alert to these challenges, and aware that the law with respect to First Nations is in a state of expansion and evolution. Of equal import, is the need for recognition of the opportunities that these recent developments may offer. Judicial acknowledgment that First Nations have particular rights and entitlements may provide additional impetus within business and industry sectors to view First Nations as prospective partners and joint venturers arriving at the negotiating table in a position of strength.

It is important to understand the context of the *Marshall* decision. This particular case deals with the *treaty* rights of a specific First Nation, and there is a significant difference between aboriginal rights and treaty rights. Not all First Nations in Canada are treaty signatories, and cases arising in British Columbia, Quebec and the northern Territories are generally based on aboriginal, as opposed to treaty, rights. Moreover, there are many different treaties in Canada that apply to many different First Nations, which may limit the applicability of a Court's analysis of any specific treaty to cases arising in a different treaty area.

This paper will not deal with the myriad of issues facing the business lawyer with respect to Aboriginal economic development. Rather, this paper will be restricted to a consideration of the *Marshall* decision and some of the ramifications for the business lawyer in Manitoba which stem from it alone, or as compared to other significant Supreme Court decisions. Brief consideration will also be given to some of the issues surrounding the question of

[1] [1999] S.C.J. No. 55 (QL) at para. 25.

consultation with First Nations. Finally a short comment will be provided with respect to some of the opportunities which may be made available to business, industry and First Nations through increased Aboriginal economic development.

2. The Basis of an Aboriginal/Treaty Right to the Commercial Harvesting of Natural Resources

The media reports surrounding the decision of the Supreme Court of Canada in *Marshall* have been numerous. Editorial pieces across the country have once again questioned the role of the Court as legislator, while others have made doomsday predictions for the Western Canadian economy. First Nations have used the media to herald the decision as the ultimate recognition of their right to a commercial fishery. In recent weeks, the controversy has spread from the waters off of Nova Scotia to the Newfoundland crab fishery and there is speculation that descendants of New Brunswick Mi'kMaqs living in the United States may now claim treaty rights to fish in Canadian waters.[2]

1. R. v. *Marshall*

The following discussion will attempt to provide a clarification and summary of both the facts and the decision in the case.

Donald Marshall, the accused, was charged with three offences against federal fishery regulations: selling eels without a licence, fishing without a licence and fishing during the closed season with illegal nets. The only issue at trial was whether Mr. Marshall possessed a treaty right to catch and sell fish under a treaty with the British Crown in 1760. The Crown contended that no such treaty right existed.

The treaty in question was a Treaty of Peace and Friendship entered into by the Governor of the territory on March 10, 1760. The clause upon which the appellant grounded the treaty right reads as follows:

> And I [the Indian Parties] do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.[3]

The majority of the Court noted that the clause as written constituted a restraint on the ability of the First Nation to trade with non-government individuals. While the trial judge had found that this clause encompassed a positive *right* of the First Nation to proffer the products of their hunting, trapping and fishing to trade, the Nova Scotia Court of Appeal held that the clause was merely a mechanism of ensuring that peace was maintained by preventing trade between the Mi'kmaq and the government's enemies. At the Supreme Court of Canada, the appellant's position was that in addition to encompassing the right to trade, the provision gave the First Nation "the right to pursue traditional hunting, fishing and gathering activities in support of that trade".[4]

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[2] See for example *Globe & Mail*: T. Flanagan, "The Marshall ruling puts Western Canadian Economy in Jeopardy", October 7, 1999; M. McKinnon, "Treaty Rights: Court Ruling may apply beyond Maritimes", October 27, 1999; J. Simpson, "The Supreme Court as Battering Ram", October 7, 1999; K. Cox, "Fishery Strife Spreads to Newfoundland" and *National Post*: R. Leishman, "Supreme Blindness", October 6, 1999; R. Fife, "Court Accused of 'Distorting' History", October 28, 1999.

[3] *Supra* note 1 at para. 5.

[4] *Ibid.* at para. 7.

In recognizing that such a proposition was not supported by the language of the treaty itself, Justice Binnie, for the majority of the Court, displayed a willingness to go beyond the four corners of the document to ascertain the scope of the treaty right. Noting that extrinsic evidence is available "even in a modern commercial context"[5], Justice Binnie considered the broader documentary record in an effort to infuse meaning into the language of the treaty. Significant reliance was placed on historical records evidencing the negotiations of the treaty terms with various communities of First Nations throughout Nova Scotia and New Brunswick. The minutes of one of these meetings included the following exchange:

> His excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time. To which they replied that *their Tribes had not directed them to propose anything further than that there might be a Truckhouse established for the furnishing them with necessaries, in Exchange for their Peltry*... [6] (emphasis added)

The majority considered the evidence of expert historians relating to the type of commodities, including fish, that would have been brought to the truck house to trade.[7] Evidence was also accepted by the majority as to the sorts of assumptions "underlying and implicit in the treaty".[8] Justice Binnie noted the longstanding willingness of courts to "imply a contractual term on the basis of the presumed intentions of the parties where it is necessary to assure the efficacy of the contract".[9]

Justice Binnie noted the requirement that the Crown act honourably in its dealings with Aboriginal people, saying that "an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is [not] consistent with the honour and integrity of the Crown".[10] His Lordship also commented on the need for a flexible approach to treaty interpretation and the requirement to avoid a "frozen in time" approach to treaty rights.[11]

The crux of the decision of the majority can be gleaned from the following passages:

> The promise of access to "necessaries" through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is extinguished...the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test...What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be

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[5] Ibid. at para. 10.

[6] *Ibid.* at para. 29.

[7] *Ibid.* at para. 37-38.

[8] *Ibid.* at para. 39.

[9] *Ibid.* at para. 43.

[10] *Ibid.* at para. 52.

[11] *Ibid.* at para. 53.

> contained by regulation within its proper limits. *The concept of "necessaries" is today equivalent to the concept of what Lambert J.A. in R. v. Van der Peet (1993), 80 B.C.L.R. (2d) 75 (C.A.), described as a "moderate livelihood"*. Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. *A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth. It addresses day to day needs.* This was the common intention in 1760. It is fair that it be given this interpretation today.[12] (Emphasis added)

Justice Binnie went on to discuss the distinction between a commercial right to fish and a right to trade for necessaries, noting that "catch limits" enabling the Mi'kmaq to produce a moderate livelihood "at present-day standards" can be established and enforced by regulation without violating the treaty right.[13]

It is worth noting the dissenting judgement in the case which was written by the newly appointed Chief Justice of the Court, Justice McLachlin.[14] While agreeing that extrinsic evidence may be used and that the historical context may be considered in treaty interpretation, Justice McLachlin nevertheless found that no general right to trade was conferred by the treaty. She proposed a two stage approach to treaty interpretation: at the first stage the "facial meaning(s)" of the treaty is determined from its wording, at the second stage these meanings are considered against the treaty's historical and cultural backdrop. Using this analysis, Justice McLachlin found that neither the words themselves, nor the historical context which gave rise to them supported the interpretation of the majority of the Court.
The essence of her decision is found in the following paragraph:

> To achieve the mutually desired objective of peace, both parties agreed to make certain concessions. The Mi'kmaq agreed to forego their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed. This is the core of what the parties intended. The wording of the trade clause, taken in its linguistic, cultural and historical context, permits no other conclusion. Both the Mi'kmaq and the British understood that the "right to bring" goods to trade was a limited right contingent on the existence of a system of exclusive trade and truckhouses. On the historical record, neither the Mi'kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade.[15]

As already indicated, this decision has been the subject of intense commentary in, and by, the media. While nobody can predict with certainty what the decision's effects, legal or otherwise will be, this wide body of commentary has on occasion suggested that certain unsupported conclusions be drawn from the case. Accordingly, it is important to be clear as to what the decision does *not* say. The judgment, as articulated by the majority of the Court, does not support the proposition that the recognized rights are to be unregulated. Nor does the decision support an interpretation that suggests that the geographic boundaries within which the right may be

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[12] *Ibid.* at para. 54-59.

[13] *Ibid.* at para. 61.

[14] *Ibid.* at para. 68 ff.

[15] *Ibid*. at para. 96.

exercised are unlimited. Finally, the decision does not address the issue of allocation of priorities between the users of the fishery or other natural resource activities.[16]

2. Pre-Marshall Decisions Relating to Aboriginal and Treaty Rights

On the heels of the 1990 Supreme Court decision in *Sparrow*[17], one legal commentator wrote as follows:

> [T]he court's refusal in *Sparrow* to address the commercial aspects of an Indian food fishery is significant...The Court not only declined the invitation but...its reasoning in *Sparrow* and in the important recent treaty rights case of *R. v. Horseman* makes unlikely the future recognition of a significant commercial component to the Aboriginal food fishery.[18]

The legal commentator in question was none other than Supreme Court Justice Binnie, author of the majority opinion in *Marshall*, who it appears has now had a hand in reversing the tide he forecasted almost a decade ago.

Justice Binnie's nine year old commentary aside, there is no question that *Sparrow* was in many respects instrumental in forging the course taken by the Supreme Court over the last ten years. With the *Marshall* decision in mind, it is useful to revisit some of the Court's most significant decisions relating to aboriginal and treaty rights.[19]

1. Sparrow

This was a case dealing with aboriginal rights in which the appellant argued that he was exercising an existing aboriginal right to fish for subsistence and ceremonial purposes. In this decision, the Supreme Court strove to give meaning for the first time to the aboriginal rights guaranteed in s.35(1) of the *Constitution Act, 1982*.[20] Of particular import for future decisions was the articulation (or reiteration) of certain principles to be applied in construing aboriginal rights. The fiduciary duty of the federal Crown to the Indians with respect to land, identified in *Guerin v. The Queen*[21], was adopted by the Court as a general guiding principle for s.35(1).[22] The Court also noted the requirement that the decision maker be sensitive to the Aboriginal perspective on the meaning of the rights at stake.[23]

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[16]Following the completion of this paper, this point was confirmed and canvassed by the Supreme Court of Canada in their decision on a motion by West Nova Fishermen's Coalition for rehearing of the *Marshall* appeal. Please see *R.v. Marshall*, [1999] S.C.J. No. 66 (QB).

[17][1990] 3 C.N.L.R. 160.

[18]W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?", (1990) Queen's L.J. 217 at 218.

[19]See text accompanying notes 33-37 for a discussion of *R. v. Horseman.*

[20]s. 35(1) of the *Constitution Act* reads as follows: The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[21][1985] 1 C.N.L.R. 120 (S.C.C.).

[22] See text accompanying notes 43-47 for a discussion of the Crown's fiduciary duty.

[23] *Supra* note 17 at 182.

There was no need for the Court to engage in a detailed analysis of the content of the aboriginal right in issue in *Sparrow*, since there was little debate over whether an "aboriginal right to fish for food and ceremonial purposes" had existed at some point in time. Instead, the Court concentrated on the questions of (1) extinguishment (in what circumstances will government decision-making result in extinguishment of aboriginal rights), (2) infringement (what kinds of government decision-making results in infringement of aboriginal rights) and (3) justification (when can a government decision-maker justify an infringement of aboriginal rights).

The Court noted that the nature of the constitutional protection afforded by s.35(1) "demands that there be a link between the question of justification and the allocation of priorities in the fishery".[24] According to the Court, any allocation of fishing priorities after valid and justified conservation measures have been taken must give top priority to Aboriginal food fishing with sport fishing and commercial fishing bearing the "brunt of conservation measures".[25]

2. Van der Peet

Like Sparrow, the decision in *R.* v. *Van der Peet*, addressed the appellant's claim to an aboriginal right to fish. In this case, the right claimed was to fish on a commercial basis. This 1996 decision set out the test for determining the existence of an aboriginal right. Chief Justice Lamer articulated the test as follows:

> In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.[26]

The Court enumerated the factors to be considered by a court when determining whether an aboriginal right has been established. These included the following:

- courts must take into account the aboriginal perspective;
- courts must consider whether the practice, custom or tradition was of central significance to the aboriginal society in question;
- courts must consider whether the practices, customs or traditions have continuity with those practices, customs and traditions that existed prior to contact; and
- courts must consider whether the practices, customs and traditions arose solely as a response to European influences.

In this case, the majority of the Court found that no aboriginal right to a commercial fishery existed for the Sto:lo First Nation. However, in the case of *R.* v. *Gladstone*, the Supreme Court accepted evidence to support an aboriginal right of another B.C. First Nation to fish commercially for herring spawn on kelp.[27]

3. Delgamuukw [28]

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[24] *Ibid.* at 184.

[25] *Ibid.* at 185.

[26] (1996), 137 D.L.R. (4th) 289 at 310.

[27] (1996), 137 D.L.R. (4th) 648.

Like the two previously described cases, this 1996 case involved aboriginal rights claims and did not involve any claims to treaty rights. In the decision, the nature of aboriginal *title* was first described by the Supreme Court. Chief Justice Lamer concluded that the content of aboriginal title, where it still exists, can be summarized by two propositions. He stated:

> First, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.[29]

Other important principles which stem from the decision in *Delgamuukw* include:

- The major distinctions between fee simple and aboriginal title are that land under aboriginal title cannot be sold except to the Crown; it is held communally; and its legal sources are a combination of common law and aboriginal law.

- Where it exists, aboriginal title encompasses mineral rights and the lands are subject to exploitation so long as the uses to which they are put do not prevent aboriginal use in the future.

- To establish aboriginal title, the group in question must occupy the land and must be able to demonstrate the existence of their aboriginal title at the time of assertion of sovereignty.

3. Manitoba Context:

1. The NRTA and the Horseman decision

As indicated above, the *Marshall* decision addressed the Mi'kmaq *treaty* right to a commercial fishery. The following discussion will deal primarily with treaty rights in Manitoba, which means that the context is different from most of the British Columbia cases which deal with *aboriginal* rights. The context for a consideration of *treaty* rights in Manitoba is also significantly different than that in the Atlantic provinces.

First Nations in Manitoba derive their Treaty rights from the eleven "Numbered Treaties" concluded between the federal government and various prairie First Nations between 1871 and 1923.[30] The Numbered Treaties use very similar language when addressing the treaty right to resource use. This excerpt is from Treaty 5, which applies to northern Manitoba:

> Her Majesty further agrees with her said Indians that they, the said Indians, shall have right *to pursue their avocations of hunting and fishing throughout the tract surrendered* and hereinbefore described, subject to such regulations as may from time to time be made by her Government of Her Dominion of

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[28] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.

[29] *Ibid.* at 1083.

[30] For a discussion on the numbered Treaties and the rights reserved by them see K. Tyler, "Indian Resource and Water Rights", [1982] 4 C.N.L.R. 1 and D.J. Kuhlen and A. Skarsgard, *A Layperson's Guide to Treaty Rights in Canada* (University of Saskatchewan Native Law Centre: Saskatoon, 1985).

> Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government.[31]

After the treaties were signed, full "administration and control" of Crown lands was transferred from Canada to Manitoba, Saskatchewan and Alberta, by constitutional enactments known as the Natural Resources Transfer Agreements. Manitoba's NRTA, which was signed in 1930, is virtually identical to the other Agreements. Paragraph 13 says:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish *for their support and subsistence*, Canada agrees that the laws respecting game in force in the province from time to time shall apply to the Indians within the boundaries thereof, *provided, however, that the said Indians shall have the right, which the Province hereby assures to them of hunting, trapping and fishing game for food* at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[32]

This language was considered by the Supreme Court in the 1990 case of *R. v. Horseman* in which the Aboriginal appellant argued that he was within the rights granted to him under Treaty 8 when he sold the hide of a bear which he had killed while unlicensed.[33] The appellant argued that he was not subject to the statutory provisions which regulated trafficking in wildlife. In a majority of four to three, the Court held that while the original Treaty right included hunting for the purposes of commerce, that right was abrogated by the NRTA which limited the right to hunting *for food* only. The majority of the court concluded that:

> The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement.[34]

The majority decision in *Horseman* has more recently been upheld in *R. v. Badger* where the Court stated:

> This Court most recently considered the effect the NRTA had upon treaty rights in *Horseman*. There it was held that para. 12 of the NRTA evidenced a clear intention to extinguish the treaty protection of the right to hunt commercially...I might add that *Horseman* is a recent decision which should be accepted as resolving the issues which it considered.[35]

As the NRTA clause applies equally to hunting, trapping and fishing, it would appear that any aboriginal or treaty right to fish, hunt or trap for commercial purposes has been completely extinguished in Manitoba. It would further appear that the judicial statement in *Badger* is the final word on this matter.

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[31] The Lake Winnipeg Treaty, Number 5, in A. Morris, *The Treaties of Canada with the Indians* (1880) p.342-348.

[32] *Constitution Act*, 1930, 20-21 George V, c.26 (U.K.), *Manitoba Natural Resources Transfer Act* R.S.M. 1987, c.N30

[33] [1990] 3 C.N.L.R. 95.

[34] *Ibid.* at 106.

[35] [1996] 2 C.N.L.R. 77 (S.C.C.) at 94.

Nevertheless, it is plausible that in light of the Court's "necessaries" analysis in *Marshall*, the interpretation of the term "for food" found in s.13 of the NRTA may once again be open for challenge. The dissenting judgment in *Horseman* is strikingly similar to Justice Binnie's analysis in *Marshall*. Justice Wilson, speaking for three of the seven justices in *Horseman*, wrote as follows:

> The reason or purpose underlying paragraph 12 [of the NRTA] was to secure to the Indians a supply of game and fish for their support and subsistence and clearly to permit hunting, trapping and fishing for food...In my view the distinction that Dickson J. drew in *Moosehunter* between hunting for "support and subsistence", and hunting for "sport or commercially" is far more consistent with the spirit of Treaty No.8 and with the proposition that one should not assume that the legislature intended to abrogate or derogate from Treaty 8 hunting rights than the respondent's submission that in using the term "for food" the legislature intended to restrict Treaty 8 hunting rights to hunting for direct consumption of the product of the hunt.[36]

Following further consideration of Treaty 8, she continued:

> But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance *or for purely commercial profit*.[37] (emphasis added)

2. "Land Claims" In Manitoba

In the Numbered Treaties referred to above, First Nations communities were promised certain allotments of "Treaty Land". Several First Nations communities in Manitoba have still not received their full allotments. Accordingly negotiations have taken place between Manitoba, Canada and particular First Nations to settle outstanding issues relating to Treaty Land Entitlement ("TLE"). A TLE Framework Agreement settling the amount of land owing to seventeen First Nations and the process for identifying it, was signed in the spring of 1997.

The Agreement provides for the selection of Crown lands and, in a few cases, money to purchase land where there is insufficient unoccupied Crown Lands in the vicinity of a particular community. Qualifying land which is selected is intended to be designated as "Reserve" land within the meaning of the *Indian Act*. The Framework Agreement includes guidelines for the selection of lands, including lands subject to third party interests (e.g. mineral rights). While an in-depth consideration of this Agreement is beyond the scope of this paper, familiarity with the TLE Framework Agreement is encouraged for any lawyer advising clients who are either contemplating, or who are already in the process of conducting, resource related business on Crown lands.

By virtue of the existence of treaties in Manitoba, it is currently through the TLE selection process that First Nations claims to land will unfold. However, earlier this year, a number of First Nations in Manitoba, Saskatchewan, and Alberta indicated their intention to challenge the legitimacy of the treaty-making process, and of the Natural Resources Transfer Agreements which followed them, in all three provinces.

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[36] *Supra* note 34 at 116.

[37] *Ibid.* at 117.

It appears that the challenge would be premised on the view that the Numbered Treaties were not land cession agreements. This view posits that, notwithstanding the written version of the treaties, the actual understanding of the Aboriginal signatories was that the land was to be shared with the European settlers and was not in fact to be "ceded" at all.[38]

The position being put forward is that all subsequent government actions which are inconsistent with this reality constitute an infringement of aboriginal or treaty rights. This would include the passage of the NRTA and would thereby extend to all judicial decisions which have been made on the presumption of NRTA legitimacy.

It is noteworthy that in *Horseman*, Justice Cory, speaking for the majority of the Court alludes to the question of the NRTA's legitimacy. In addressing the abrogation of the commercial right to hunt, he says:

> [A]lthough it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case.[39]

3. General Ramifications

In light of Manitoba's constitutional framework as judicially interpreted by the Supreme Court in *Horseman* and *Badger*, it would appear at first blush that there is no immediate issue in this province with respect to Aboriginal claims to a treaty right to fish on a commercial basis. The same can be said for both hunting and trapping in the province. But as has been repeatedly noted in news broadcasts across the country, some First Nations take the position that the applicability of the *Marshall* decision extends to the harvesting of other natural resources on some commercial scale.

Accordingly, persons involved in any manner in any natural resource industry in this province should not sit back secure in the notion that this particular case will have little effect. The following is a summary of some of the issues which have either been alluded to in the foregoing discussion or which also arise by virtue of the matters discussed therein.

1. Beyond merely acknowledging the existence of the Mi'kmaq treaty right to a "limited" commercial fishery, the *Marshall* decision reaffirms a commitment by the Court, articulated previously in cases such as *Sparrow*, *Van der Peet*, *Badger* and *Delgamuukw*, to look to the aboriginal perspective when interpreting historically based claims by a First Nation against the Crown. This commitment appears to include going beyond the written record to ascertain the perspectives and intentions of the parties to the Agreement.

   As was discussed earlier, this principle may ultimately be used as a basis of Manitoba First Nations claims relating to the Numbered Treaties. Legal Counsel for the Manitoba Metis Federation has recently suggested that it will rely on *Marshall* to argue that the court should consider the underlying negotiations

[38] This position is alluded to in the article by T. Flanagan, *supra* note 2.

[39] *Supra* note 33 at 105.

between Louis Riel and the federal government which gave rise to the rights of the Metis, embodied in the *Manitoba Act* of 1870, upon which Metis land claims in Manitoba are based.[40]

It is possible that in interpreting agreements entered into in the course of business transactions between Aboriginal and non-Aboriginal parties, courts may move towards an application of the "aboriginal perspective" principle. While one cannot envision the precise parameters within which such an interpretation would take place, it is nonetheless useful for business lawyers to be able to advise their clients of the existence of this trend prior to entering into negotiations. The *Marshall* decision should serve as an alert to the danger, long familiar to the commercial lawyer, of relying solely on a written agreement without regard to principles of unconscionability, prior negotiations and intention of the parties.

2. Should a judicial reconsideration of the prairie treaties be effected with a subsequent determination that the Numbered Treaties did not fully extinguish aboriginal title, then a situation of "comprehensive land claims" may arise in this province. As discussed above, aboriginal title encompasses significant rights with respect to the lands including, among other things, a right to the mines and minerals found therein. Beyond merely providing for land and financial compensation, comprehensive land claim agreements envision provisions dealing with the management, development and profits accruing from use of land.

3. Should an aboriginal or treaty right to commercial activity be established for a particular First Nation, such a right might be placed along the *Sparrow* "priority spectrum", above the right of non-aboriginals and/or other First Nations to engage in the commercial harvesting of the particular resource.

   The ambiguity of the scope of the right established in *Marshall* is certain to raise questions as attempts are made at regulation. Among the most obvious issues created by this decision are the following:

   - What constitutes a "moderate livelihood"? The decision notes that a moderate livelihood *includes* such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth. What else does a moderate livelihood include? Where is the line between meeting needs and accumulating wealth?

   - How does the government regulate particular industries or mix of resource extraction activities to accurately reflect this benchmark?

   - Does a "moderate livelihood" vary on a province by province basis? Does a "moderate livelihood" vary on an industry by industry basis?

3. Consultation Requirements

Much has been written on the subject of consultation with First Nations.[41] More specifically, a wide body of case law and literature exists on the topic of the fiduciary duty of the Federal Crown to consult with First Nations

[40] K. Guttormson, "Metis move forward on land claims fight", in the *Winnipeg Free Press* October 31, 1999.

[41] See for example a number of recent papers dealing with the topic of the duty to consult in the natural resources context. The following papers offer an excellent overview of issues relating to fiduciary duty, consultation requirements and aboriginal rights to natural resources: K.E. Buss, "The Duty to Consult and Aboriginal Interests in Natural Resources on the Prairie Provinces", prepared for the 1998 Canadian Bar Association Annual Conference; T. Campbell & M. Frey, "Aboriginal Rights and Title, Treaty Rights and Access to Provincial Crown lands: The Basics", prepared for the Canadian Corporate Counsel Association (CCCA) 11th Annual Meeting, August, 1999; and R.B. Hansen, "The Merits of Consultation Between Resource Developers and First Nations", prepared for the CCCA 11th Annual

when making decisions that could affect their rights and interests.[42] This paper will not provide a comprehensive review of these topics, however the following discussion will attempt to highlight the source, nature and scope of the consultation requirements and their applicability to those involved in business in Manitoba.

1. Fiduciary Duty of the Crown

In the case of *Guerin v. R.*[43], the Supreme Court of Canada discussed for the first time the circumstances that give rise to fiduciary duties on the Federal Crown towards First Nations. This principle has been subsequently affirmed in a long line of cases, commencing with *Sparrow* and most recently in *Delgamuukw.* The source of this duty stems from the ability of the Crown to make unilateral decisions that affect the rights of First Nations.

The content of the duty has most recently been judicially considered in the context of aboriginal title by the Supreme Court in *Delgamuukw.* The court wrote as follows:

> There is always a duty of consultation [if a decision is being made that infringes the rights of First Nations]. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances.[44]

As will be discussed below, the legal duty of consultation is one imposed on the Crown only and not on any and all persons or entities involved in activities with First Nations. Nevertheless, a more recent series of cases has seen some discussion as to the role of the resource developer in assisting the Crown to carry out its consultation obligations. Some of the more noteworthy points to come out of this jurisprudence may be summarized as follows:

- In the case of *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, a cutting permit was issued to a resource developer following extensive consultation between the developer and the First Nation. The majority of the British Columbia Court of Appeal held that these consultations were not sufficient to discharge the Crown's fiduciary duty to consult. In order for consultation to be effective, a Crown representative must be directly involved in consultation efforts.[45] The decision is notable in that it points to the existence of a provincial duty but failed to indicate the basis of this duty and the circumstances under which it arises.

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meeting, August, 1999.

[42]See for example, B. Slattery "First Nations and the Constitution: A Question of Trust" (1992) 71 Canadian Bar Review 261; P.W. Hutchins, D. Schulze & C. Hilling, "When Do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask.L.R. 97, D.P. Owen "Fiduciary Obligations and Aboriginal peoples: Devolution in Action", [1994] 3 C.N.L.R. 1

[43]*Supra* note 21.

[44]*Supra* note 28 at 1113.

[45][1999] B.C.J. No.1880 (QL), upholding [1997] B.C.J. No. 1494 (S.C.) (QL).

- In *Kitkatla Band v. British Columbia (Minister of Forests)*, while declining to rule on whether sufficient consultation had taken place, the Court noted with approval the extensive effort of the resource developer to effect consultation at each juncture.[46]

- In a subsequent British Columbia case, *Kelly Lake Cree Nation* v. *Canada (Minister of Energy and Mines)*, the court held that "the process of consultation cannot be viewed in a vacuum and must take into account the general process by which government deals with First Nations people".[47]

There are a number of reasons why a developer should be at least cognizant of the fiduciary duty of the Crown. The *Kelly Lake Cree Nation* decision seems to suggest that a developer may have a role to play in assisting the Crown in carrying out its duty and that accordingly, consultation by the developer falls within the general process of Crown consultation envisioned by the Courts.

The more pressing concern on the part of a developer, however, should be to avoid a situation akin to that in *Halfway Cree Nation*, where extensive consultations by the developer did not obviate the need for direct input by the Crown. The dangers of such a situation are obvious: significant time, energy and resources could be invested in a project on the belief that the appropriate consultations have taken place, only to find the project placed on hold because of a failure by the Crown to meet its fiduciary obligations.

2. Administrative Law ***and Statutory Requirements***

Both the *Halfway River First Nation* case and the *Kelly Lake Cree Nation* case considered the issue of consultation in the context of administrative law principles of procedural fairness as well as in the context of fiduciary duty. The Crown was the respondent in both instances, and the court held in both cases that the duty to consult was a legal duty owed by the Crown and was therefore encompassed under the rubric of procedural fairness.

While it is important for resource developers to be cognizant of the existence of the Crown's fiduciary duty, issues with respect to their own consultation requirements will arise primarily in the administrative law context by virtue of provincial legislation and rules of procedural fairness.

Many provincial statutes, particularly those relating to environmental assessments, require that certain information be obtained and provided to the appropriate administrative decision makers prior to the granting of licenses or approvals. These administrative bodies may impose pre-conditions requiring the applicant to include as part of this information, evidence of consultation and/or approval by other interested parties. Effectively, the administrative bodies ensure that their own obligations of procedural fairness are being adhered to through the applicants themselves.

This issue was illustrated in a recent decision of the Federal Court of Appeal. The Court held that the National Energy Board (the "Board") breached the rules of procedural fairness when it determined that the respondent, Maritimes and Northeast Pipeline Management Ltd. (the "Company"), had satisfied a condition of a Certificate of Public Convenience and Necessity, issued by the Board for the construction of a natural gas pipeline.[48] The

[46][1998] B.C.J. No.1616 (S.C.) (QL).

[47][1998] B.C.J. No. 2471 (S.C.) (QL).

[48]*Union of Nova Scotia Indians* v. *Maritimes and Northeast Pipeline Management Ltd.*, [1999] F.C.J. No. 1546 (QL).

applicant in the case was the Union of Nova Scotia Indians ("UNSI"). As a result of a recommendation by the Joint Public Review Panel, the Board made the Certificate subject to the following condition:

> The Company shall submit to the Board a written protocol or agreement spelling out Proponent-Aboriginal roles and responsibilities for cooperation in studies and monitoring.[49]

In June of 1998, following discussions between the Company and UNSI, a draft agreement in principle was provided to UNSI. Thereafter, the Company submitted a "protocol of commitments" to the Board and asked that it be accepted as a fulfilment of the condition. While the UNSI had previously submitted a letter addressing some of the issues in the condition, it did not have an opportunity to respond directly to the Company's final proposal. The Court noted that the Board became increasingly informal with respect to procedural fairness, neglecting to copy all parties with its correspondence. It stated that "in dealing with the respondents and applicants separately, with neither knowing precisely what the other was submitting to it, the Board fell into error".[50] This decision, like the decision in *Halfway River First Nation*, should alert the developer to the need to ensure that the administrative decision maker is fulfilling *its* obligations - in this case, the obligation being one of procedural fairness.

While pointing to the "unique circumstances of this case", the court made no reference to fiduciary obligations or to Aboriginal or Treaty rights. It is noteworthy (perhaps as a reflection of public perception) that the view articulated in a national newspaper was that Nova Scotia natives have "won yet another native rights court battle".[51]

It should be further noted that, in a 1994 decision, *Quebec (Attorney General)* v. *Canada (National Energy Board)*, the Supreme Court held that no fiduciary duty was owed by the National Energy Board to the aboriginal appellants.[52] In reaching its decision the Court noted that the function of the Board is quasi-judicial and "inherently inconsistent with a duty of utmost good faith between the Board and a party appearing before it".[53]

Most statutory requirements for consultation arise in the context of environmental legislation. The degree to which consultation with First Nations is statutorily contemplated varies from province to province.[54] To this writer's knowledge, there is currently no Manitoba legislation which specifically mandates consultation with First Nations by resource developers. However, consultation with aboriginal peoples is contemplated as a Principle of Sustainable Development, in Schedule A to the *Sustainable Development Act*. It reads as follows:

> 3(4) Manitobans should consider the aspirations, needs and views of the people of the various geographical regions and ethnic groups in Manitoba, including aboriginal peoples, to facilitate equitable management of Manitoba's common resources.[55]

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[49] *Ibid.* at para. 3.

[50] *Ibid.* at para.16.

[51] B. Laghi, "Native Ruling Could Delay Megaproject", *Globe & Mail*, October 22, 1999.

[52] [1994] 1 S.C.R. 159

[53] *Ibid.* at 184.

[54] See for example British Columbia's *Environmental Assessment Act* which specifically contemplates consultation with First nations. See also Ontario's *Crown Forest Sustainability Act* which provides that the Minister may enter into agreements with First Nations for the joint exercise of any authority under Part II of the Act dealing with Management Planning and Information.

[55] *Sustainable Development Act* S.M. 1997, c.61, S270

There is no provision in Manitoba's *Environment Act* requiring consultation with First Nations. In 1994, the Swampy Cree Tribal Council and Manitoba Keewatinowi Okimakanak Inc. were among several applicants on a judicial review application arguing that the *Act* required input from the public into the terms of reference for a public hearing as well as to the scope of the environmental impact assessment. The decision of the Manitoba Court of Queen's Bench held as follows:

> There is no provision for public input into the form or content of an environmental impact statement or the terms of reference and guidelines directed by the Minister to the Commission. The latter are administrative acts solely within the prerogative of the Minister.[56]

A statement of claim was subsequently filed on behalf of the First Nations applicant raising issues of aboriginal rights and alleging the existence of a fiduciary duty on the part of the provincial crown with respect to the assessment and approval of environmental licences in such circumstances.[57] The case has yet to be decided.[58]

3. Business Relationships and Due Diligence

One author has written that "the most notable defect of the *Guerin* decision was its failure to answer the question of who owed fiduciary obligations to First Nations".[59] The law remains unsettled as to how far down the "Crown chain" that duty extends. There is most certainly no corresponding fiduciary duty owed by non-Crown entities. Heed should, however, be paid to the words of Justice Dickson in *Guerin* where he stated:

> [T]he categories of fiduciary, like those of negligence are never closed...[Whenever] one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.[60]

While the nature of the fiduciary duty owed by the Crown to First Nations has been described as *sui generis*, the general law of fiduciaries has evolved in such a way that the spectre of a fiduciary duty has been raised in the context of joint venturers in commercial transactions. This issue arose in the *Lac Minerals* case when one party used confidential information obtained in the course of joint venture negotiations with another party, for its own benefit.[61] The Court was divided and ultimately found that there had been a breach of a duty not to disclose confidential information but no breach of a fiduciary duty. The absence of "vulnerability " or "dependency" was determinative for the majority in finding that a fiduciary relationship did not exist.

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[56] *Swampy Cree Tribunal Council* v. *Clean Environment Commission* (1994), *94* Man. R. (2d) 188 at 195.

[57] *Manitoba Keewatinowi Okimakanak Inc. et al* v. *The Attorney General of Manitoba et al*, File No. CI-95-01-90864, filed July 12, 1995.

[58] A Judicially Assisted Dispute Resolution Conference memorandum dated June 16, 1999 indicates that the Conference is to reconvene in early November of this year.

[59] L.I. Rotman, "Provincial Fiduciary Obligations to First nations: The Nexus Between Governmental Power and Responsibility" 32:4 Osgoode Hall L.J. 735 at 739.

[60] *Supra* note 21 at 137.

[61] *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

Clearly the obligations attendant on any party to commercial negotiations will be applicable whether or not one or more of the parties thereto are Aboriginal. If there is in fact a duty on business venturers to consult with First Nations, it must be clear that this duty is not a subset of the Crown's fiduciary duty, but is a duty that arises out of business and legal principles applicable to any and all commercial parties. This may, depending on the particular circumstances arise out of a fiduciary duty as interpreted at common law. It may also be arguable that the combination of fiduciary principles and jurisprudence on "aboriginal perspective" is such as to generate a new requirement for consultation and good faith in a wide range of negotiations with First nations.

At minimum, these sorts of considerations might be weighed in the course of a company's due diligence. Due diligence has been defined as "an investigation sufficient to confirm the truth of relevant facts, to verify the value of property or to identify risks and liabilities".[62] Consultation with First Nations and/or analysis of the various rights held by them should become a standard part of this process where there is any possibility that these rights may be affected and liabilities incurred.

Above and beyond any legal duty on the part of business to consult with First Nations, consideration must be given to the value of establishing business relationships through a process of trust and openness. The benefits of a consultative process are many and include such things as: development and access to employment and business resources; acquisition of knowledge with respect to land use, land history and sustainable development; avoiding risks and their associated costs (i.e. litigation); and being a good neighbour.[63]

4. Opportunities

The decision in *Marshall* has cast a new light on Aboriginal economic development and, in order to address this, this paper has focused largely on the commercial development of natural resources. Thus far, the objective of this discussion has been to put the business lawyer on the alert with respect to rights of, and duties owed to, First Nations by virtue of a number of legal principles.

While it is the responsibility of the legal advisor to address potential concerns in any business transaction, the lawyer may also play a role in identifying benefits and opportunities for his or her client. There are a significant number of benefits to be had for business entities who choose to enter into business relationships with Aboriginal communities. Moreover the benefits derived from cooperative initiatives flow in two directions:

> The aboriginal party may acquire much needed capital, management, marketing and business administration expertise, equipment, technology and know-how, new personnel training, new employment opportunities, access to new markets, and perhaps commercial prestige from its co-venturer, and will succeed in reducing risks, achieving economies of scale and learning new models for commercial ventures. In exchange, the Aboriginal side will often provide a labour pool, trainees, capital, natural resources, goodwill and a cooperative approach to the development of its land and resources.[64]

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[62] G. C. Glover, "What is Due Diligence?", Presented at the Second Annual Due Diligence Conference, Toronto, April 28 & 29, 1999.

[63] See Hansen, *supra* note 41.

[64] P.K. Frits, "Aboriginal Business: Law and Reality", prepared for Insight Information Inc.'s conference, "Aboriginal Law and Business", November, 1993.

The remaining portion of this paper will briefly highlight some of the considerations to bear in mind when entering into business initiatives with First Nations.

The following is a summary of some of the basic formalities of which business entities should be aware prior to entering into contractual arrangements with First Nations:[65]

- Indian Bands are established under the *Indian Act* and are defined as a "body of Indians" for whom lands have been set aside, for whom the federal government holds funds in trust, or as that group of Indians who have been declared by the Governor-in-Council to be a band for the purposes of the Act. Band Councils may be created pursuant to s.74 of the *Act* or may be created according to the custom of the Band.[66]

- Confusion frequently arises because a Band Council sometimes acts like a governing body, and at other times behaves more like a natural person. A Band Council is free to contract in the same way as any other party, subject to the laws of general application.[67] A Band Council may incur legal obligations and may be sued in its own name in relation to those obligations.[68]

- A power conferred upon the council of a Band, such as entering into contracts, shall be deemed not to be exercised unless it is exercised pursuant to a decision made by a majority of the councillors at a meeting of Council duly convened.[69]

- Whether such a decision is made is a question of fact. There is no legal requirement for a Band Council Resolution ("BCR"), although this is the most commonly used evidence of such a decision.[70]

- The scheme of the *Indian Act* is structured to maintain reserve lands and resources for the benefit and use of Band members, and the methods whereby more than a leasehold interest can be granted in reserve lands are limited.[71] Note, however, that without special consultation with its members and the concurrence of Canada, the Chief and Council cannot make agreements that involve the sale, lease, or occupancy of Indian Reserve land.[72]

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[65]For a more comprehensive discussion on the formalities of entering into business with First Nations, see K. Gilson, "Doing Business with First Nations", prepared for Law Society of Manitoba Continuing Legal Education Series "Aboriginal Law for Corporate/Commercial Lawyers", March 1998.

[66]*Indian Act* R.S.C. 1985, c. I-5.

[67]*Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*, [1994] 1 C.N.L.R. 206 (Alta. Q.B.).

[68]*Kucey* v. *Peter Ballantyne Band Council*, [1987] 3 C.N.L.R. 68.

[69]*Indian Act,* s.2(3)(b) and Indian Band Council Procedure Regulations C.R.C. 1978, c.950.

[70]See Gilson, *supra* note 65 at I-2 for a discussion on Band Council Resolutions.

[71] A discussion of the intricacies of doing business on reserve lands is beyond the scope of this paper. However, see an article by the author, Robert Adkins, prepared for Law Society of Manitoba Continuing Legal Education Series "Aboriginal Law for Corporate/Commercial Lawyers", March 1998 entitled "Some Legal Issues in Relation to Real Estate Development and Operation of a Business on Reserve". See also S. Aronson, "First Nations Land Development: Methods and Issues", November 1993, prepared for Insight Information Inc.'s conference "Aboriginal Law and Business".

[72] *Indian Act*, ss. 28; 37-41; 53.

- The Indian Act also protects certain personal property owned by Indians, by making it exempt from taxation and garnishment. These provisions must be clearly understood by anyone entering into commercial relations with First Nations businesses.

The type of business structure entered into by or with Aboriginal communities will vary significantly depending on the circumstances of the particular project and on the relationship of the parties thereto. The same issues which are contemplated prior to the creation of any corporate structure will be equally applicable when doing business with First Nations (i.e. limiting liability, providing for distribution of profits, allocating decision making authority etc.).

Certain business vehicles have attracted particular attention in the context of Aboriginal initiatives because of the unique status of First Nations. The joint venture has been particularly attractive because "each co-venturer retains its autonomy from a liability perspective, from a taxation perspective, and also from the important perspective of the ownership of rights or interests in property that may be used in the venture".[73] A joint venture initiative may be of particular appeal in that the non Band member co-venturer does not need to take an interest in any on-reserve property, thereby avoiding the complexities of the *Indian Act* provisions.[74]

The examples of successful business ventures between First nations and non-Aboriginal business entities are abundant and continue to steadily increase in number.[75]

5. Conclusion

While his comments were made in the context of historical considerations, the remarks of Justice Binnie which open this paper are equally apt in a modern context. Starvation, in a metaphorical as well a literal sense, undoubtedly breeds discontent in any population. As the Royal Commission on Aboriginal Peoples (RCAP) Report points out, "unresolved land and resource issues, while not entirely responsible"[76] lie behind many of the problems afflicting Aboriginal communities.

Many of the recommendations found in the RCAP report relate to the promotion of Aboriginal economic development, particularly in the area of natural resources. In noting the success of one particular initiative, the Commission stated:

> The Meadow Lake case is also significant because it shows that gains for Aboriginal people do not automatically mean losses for other Canadians. The mill and the woods operations of the Meadow Lake Tribal Council are providing jobs for Aboriginal and non-Aboriginal people alike. This kind of positive example can help to allay fears about the expected impact of claims settlements on the rights of landowners, resource industries, municipalities, anglers and hunters and other interested parties.[77]

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[73] *Supra* note 64 at 10.

[74] *Ibid.* at 11.

[75] For a discussion of examples of these sorts of initiatives, see P. Sloan and R. Hill, *Corporate Aboriginal Relations: Best Practice Case Studies*, (Hill Sloan Associates Inc.: Toronto, 1995).

[76] *Report of the Royal Commission on Aboriginal Peoples*, 1996, Volume 2, restructuring the Relationship, Part 2 at 684.

[77] *Ibid.* at 681.

After the *Horseman* decision, lawyers could advise clients that the law in Manitoba was relatively clear: the Numbered Treaties on the prairies had been amended by the NRTA and there was no longer a treaty right to the commercial harvest of wildlife in Manitoba. Following the *Badger* decision, lawyers could advise clients that in Manitoba, with respect to this particular issue, there was about as definitive a position as any which exist in the area of "aboriginal law". Following the *Marshall* decision, and perhaps in light of the fallout from that decision, lawyers are left to ponder whether the Supreme Court of Canada will revisit this issue with respect to the Numbered Treaties and the NRTA.

The answer is, and probably always was, yes, the issue will be revisited but within an existing and understood context. In that sense "aboriginal law" is no different than other areas of law. Courts will always strive to do what they consider to be right having regard to the facts, and to the law in the broadest sense of that word (which includes the constitution and where relevant, aboriginal and treaty rights).

The law is never really settled, it grows and changes, but within a context and a framework that can usually be understood and rationalized. No one can anticipate how the law will evolve and what it will look like at any point in time. For the most part, however, we know with some certainty that there will be a logical connection in this development process. Court decisions, however bold, must be made in a context which supports and strengthens them, otherwise they run the risk of being overturned either by the higher Courts or through the enactment of legislation.

In Manitoba there are treaty rights. They must be considered by resource developers and interpreted by the Courts. This interpretation will take place within the constitutional, legislative and jurisprudential framework that exists in this province and this country. Inevitably, it will also take place in a manner which the particular Court believes to be fair, having regard to existing factual, social, political and legal conditions.

The Supreme Court of Canada has given many signals that it will not shy away from interpreting and applying treaties in a modern context. This does not mean that the Court will reject historical understandings or previous jurisprudence. To the contrary the Court has embraced historical evidence in an effort to ascertain what was intended by the treaty signatories. This intention is then applied to a modern setting, within today's legal and constitutional framework.

Lawyers acting for First Nations, resource developers or government, need to understand these treaties in the same context. Anticipating how the court will respond to particular cases is a fairly ineffective exercise when in case after case, there is division among the judges on the various Courts themselves. Developing familiarity with the issues and the possible results arising out of them, is a more fruitful endeavour. The law is not certain. Lawyers and their clients have to structure their deals notwithstanding the uncertainties. To the extent that they are foreseeable, lawyers need to make provision for contingencies relating to the rights and interests of First Nations; alternatively, they need to advise their clients who can *knowingly* assume or not assume the risk.

Rather than seeing these developments as potential threats or impediments, they can be embraced as opportunities. Long term vision on the part of the business community will recognize that strengthening Aboriginal economies and communities will be mutually beneficial to Aboriginal and non-Aboriginal communities alike. As the RCAP report notes:

> [S]haring must take a form that enhances, rather than diminishes, people's capacity to contribute to the whole...just as they helped newcomers in the past, Aboriginal peoples should be assisted

> to develop economic self-reliance through new relations of economic co-operation in resource development and other fields.[78]

At the turn of the century it was suggested that the 20th century belonged to Canada. Now pundits are suggesting the 21st century will belong to Canada. Whether that is true or not depends in no small way upon whether this country, its institutions and its people can create the relationships and develop the initiatives which are necessary to tap its great natural and human resources.

[78] *Supra* note 76, Volume 1, Looking Forward, Looking Back at 688.